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SERVICE DATE – LATE RELEASE JULY 27, 2005

## SURFACE TRANSPORTATION BOARD

### DECISION

STB Docket No. AB-55 (Sub-No. 568X)

#### CSX TRANSPORTATION, INC. — ABANDONMENT EXEMPTION — IN FRANKLIN COUNTY, PA

Decided: July 27, 2005

We are denying the petition for reconsideration and reopening filed March 1, 2005, by New Franklin Properties, LLC (NFP). We are also denying the stay request that was included within the petition.

### BACKGROUND

By petition filed November 16, 1998, CSX Transportation, Inc. (CSXT), sought an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 1.9-mile portion of its line of railroad known as the Baltimore Service Lane, Lurgan Subdivision (the line), extending between milepost BAV-20.5 at 4th Street and milepost BAV-22.4 at Commerce Street in Chambersburg, Franklin County, PA. The line consists of three segments: Segment 1, which extends from 4th Street (Valuation Station 1083+20, at milepost BAV-20.5) to Main Street (Valuation Station 1096+20, at approximately milepost 20.8); Segment 2, which extends from Main Street (Valuation Station 1096+20, at approximately milepost 20.8) to South Street (Valuation Station 1122+30); and Segment 3, which extends from South Street (Valuation Station 1122+30) to Commerce Street (milepost BAV-22.4).

By decision and notice of interim trail use or abandonment served March 9, 1999 (March 1999 Decision), the Board exempted the abandonment of the line, subject to public use, trail use, and standard employee protective conditions. The March 1999 Decision provided, among other things, that any offer of financial assistance (OFA) “under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by March 19, 1999, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C).” March 1999 Decision, slip op. at 7.

On March 12, 1999, Frederick A. Fox, Kaye A. Fox, and Frederick Armstrong Fox (collectively, the Foxes) timely filed an OFA to purchase Segment 2, and, by decision served

May 7, 1999, the Foxes were authorized to acquire Segment 2.<sup>1</sup> Not quite 2 years later, however, by letter filed on February 22, 2001, the Foxes sought to withdraw their OFA for Segment 2, and, by decision served March 30, 2001, the OFA process was terminated and the decision served May 7, 1999, was vacated. Several months after that, however, by letter filed on July 24, 2001, the Foxes asked that their OFA be reinstated. CSXT did not object. By decision served September 10, 2001, their OFA was reinstated and they were again authorized to acquire Segment 2.

As noted above, the March 1999 Decision set March 19, 1999, as the deadline for filing an OFA in this proceeding. More than 4 years after that date, the Foxes filed, on August 15, 2003, a petition seeking either the Board's acceptance of an amended OFA that would include not only Segment 2 but also Segment 1, or, alternatively, the reopening of the March 1999 Decision to permit the filing of a new OFA that would include both segments. One month later, NFP filed, on September 23, 2003, a petition seeking permission to intervene as a party in this proceeding, and requesting that the Board either grant the relief requested in the August 15th petition filed by the Foxes, or, alternatively, reopen the March 1999 Decision to afford NFP the opportunity to file its own OFA for Segment 1. By decision served January 20, 2004 (January 2004 Decision), NFP was permitted to intervene, but, in a decision of the Director of the Board's Office of Proceedings served on July 8, 2004 (July 2004 Decision), the petitions filed August 15, 2003, and September 23, 2003, by the Foxes and NFP, respectively, were denied, insofar as such petitions sought to include Segment 1 within either a new OFA or a modification now of the original OFA that was filed. It was noted, in the July 2004 Decision, that CSXT had made clear that it opposed expansion of the OFA to include Segment 1. And it was explained that, "[b]ecause the time for filing an OFA for Segment 1 expired over 5 years ago, in March 1999, and that limit is meant to protect the owning railroad, the requested expansion of the OFA to include Segment 1 will be denied at this late date." July 2004 Decision, slip op. at 2. It was ordered that the Foxes would have until July 19, 2004, to notify CSXT whether they still intended to acquire Segment 2 through the OFA process, and it was further ordered that,

[i]f the Foxes notify CSXT by July 19, 2004, that they still intend to acquire Segment 2 through the OFA process, consummation of the acquisition of Segment 2 must occur by August 9, 2004, unless CSXT and the Foxes agree otherwise. If the Foxes notify CSXT, by July 19, 2004, that they intend to acquire Segment 2 through the OFA process, but consummation of the acquisition of Segment 2 has not occurred by August 9, 2004, and CSXT and the Foxes have not reached an agreement for an extension of this new deadline, the OFA will be deemed to have been withdrawn and CSXT may proceed to dispose of Segment 2 either under the interim trail use/rail banking condition or as abandoned property.

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<sup>1</sup> From 1998 through 2001, the pleadings filed in this proceeding by the Foxes also included Karla M. Fox as an offeror.

July 2004 Decision, slip op. at 3. Thereafter, by letter filed on August 6, 2004, the Foxes — and also NFP (a limited liability company that is wholly owned by Frederick Armstrong Fox) and Kensington Properties, LLC (another limited liability company that is wholly owned by Frederick Armstrong Fox) — advised that they had elected not to pursue their OFA respecting Segment 2.

In the petition filed March 1, 2005, NFP asks that we reconsider the July 2004 Decision and reopen the March 1999 Decision to permit the filing of an OFA for Segment 1. NFP also asks that we stay CSXT's right to exercise its abandonment authority for Segment 1, pending our disposition of the March 1st petition. Two replies have been filed, one (on March 16, 2005) by the Borough of Chambersburg (the Borough), and the other (on March 21, 2005) by CSXT. The Borough and CSXT urge denial of the relief sought by NFP. On March 30, 2005, NFP filed a pleading it calls a "surreply." On April 19, 2005, CSXT filed a pleading that includes both a motion to strike the surreply and a reply to the surreply. On April 25, 2005, NFP filed a reply to the motion to strike.

#### POSITIONS OF THE PARTIES

NFP's petition asks that we allow NFP to file — 6 years after the original March 19, 1999 deadline — an OFA for Segment 1. NFP contends that allowing such a filing would not interfere with CSXT's legitimate goals for any part of the line. NFP explains that, although CSXT has said that it seeks an expeditious end to this proceeding, it was CSXT that filed, after the July 2004 Decision was issued, two requests to extend the time to exercise its abandonment authority. See decisions served July 27, 2004, and January 28, 2005. NFP argues that, given CSXT's requests to enlarge the time within which it must consummate the abandonment, CSXT cannot complain that allowing NFP to submit an OFA for Segment 1 will unreasonably delay the conclusion of this matter. NFP also argues that, in order to further the rail transportation policy articulated by Congress in 49 U.S.C. 10101, the regulatory framework applicable to OFAs must retain the flexibility to adapt to changing circumstances relating to the ownership and use of real property served by a rail line. NFP adds that Gaumer Industries (GI) and Gaumer's Chassis Engineering (GCE) (enterprises owned by the Foxes, see January 2004 Decision, slip op. at 2-3) have a present need for rail service. However, the track on NFP's property (NFP owns property adjacent to Segment 1, see January 2004 Decision, slip op. at 2 n.4) will need to be upgraded and repaired to handle rail deliveries. NFP states that it is fully prepared to undertake this expense, but that it does not wish to do so unless it knows it can control its access to rail service through the ownership of Segment 1. Also, NFP claims that permitting NFP to file an OFA for Segment 1 will not prejudice the Borough because the Borough has no legitimate railroad use for Segment 1.

The Borough advises that it has been working with CSXT towards a transfer of Segments 1 and 2 from CSXT to the Borough. The Borough contends that the Borough, rather than a non-public entity, should own Segment 1 because that would leave open the possibility of future rail use (although none is now planned) for Segment 2 (which will be rail banked). The

Borough further contends that it would be prejudiced by a reopening because of the time and expense it has already incurred in arranging a transfer of Segment 1 from CSXT to the Borough.

CSXT advises that, in accordance with an agreement it concluded with the Pennsylvania Department of Transportation, it has already consummated abandonment of Segment 3 (and transferred that segment to the Borough) and is in the process of finalizing an agreement for the Borough to acquire Segments 1 and 2. CSXT further advises that the Borough intends to convert Segment 2 into a trail and to maintain the rail and track material on Segment 1 so that continued rail service can be provided over Segment 1 after CSXT has reclassified that segment as spur or other excepted track under 49 U.S.C. 10906. CSXT contends that private negotiations between the Borough and NFP are preferable to the reactivation of the OFA process 6 years after the OFA was required to be filed with the Board.

### DISCUSSION AND CONCLUSIONS

*Preliminary Matter.* We will grant CSXT's motion to strike the surreply. First, the surreply amounts to a reply to the replies previously filed by the Borough and CSXT (on March 16, 2005, and March 21, 2005, respectively), and our regulations do not allow for a reply to a reply. See 49 CFR 1104.13(c). Second, with the exception of the information (neither newly discovered nor even arguably relevant) regarding NFP's formation date (NFP was formed on December 17, 2001), the surreply contains nothing that has not already been entered into the record in this proceeding in the pleadings previously filed by NFP and the Foxes.

*Reconsideration/Reopening Petition.* An initial decision by the Director of the Office of Proceedings determining whether an OFA satisfies the statutory criteria of 49 U.S.C. 10904(d) may be appealed to the entire Board under 49 CFR 1152.25(e)(1)(i). Such appeals must be filed within 10 days of service of the Director decision. 49 CFR 1011.2(a)(7).

However, any interested party may petition to reopen and reconsider an action of the Board under regulations promulgated by the Board. 49 U.S.C. 722(c). In abandonment cases such as this, the regulations at 49 CFR 1152.25(e)(4) apply and provide that a petition to reopen an administratively final action must state in detail the respects in which the challenged decision involves material error, or is affected by new evidence or substantially changed circumstances. Such petitions will be granted only upon a showing that the challenged action would be materially affected by one or more of those criteria. 49 CFR 1152.25(e)(2)(ii).

Because NFP's petition seeks untimely reconsideration of the July 2004 Decision and again seeks the relief that was denied in that decision, i.e., reopening of the March 1999 Decision to allow NFP an opportunity to file an OFA for Segment 1, it is treated as a petition for reopening. But NFP has failed to justify reopening, in that it has failed to show material error in the Board's prior decisions, and it has not demonstrated changed circumstances or submitted any new evidence that would warrant granting its petition. Therefore, the petition will be denied.

The July 2004 Decision correctly noted that the OFA process includes Congressionally imposed deadlines designed to protect the owning railroad from bearing the costs associated with unreasonable delay in disposing of rail lines approved for abandonment. Although we have extended the deadlines when the owning railroad does not object to the extension because that Congressional intent is not compromised, here the owning railroad objects to further delay in this proceeding. The deadline for filing an OFA for Segment 1 expired over 6 years ago (on March 19, 1999). It is true, as NFP observes, that, “[a]s the history of this case illustrates, there can be situations in which allowing a late-filed OFA may be consistent with” the objectives of the OFA statute. January 2004 Decision, slip op. at 4. That decision explained that such “unique circumstances” had occurred in this proceeding in 2001 when, with CSXT’s concurrence, the Foxes were allowed to reinstate, more than 2 years after the OFA deadline had expired, their withdrawn OFA for Segment 2. Id. But it is clear that, given CSXT’s present opposition to the filing of an OFA for Segment 1, we can no longer rely here on the “unique circumstances” cited in the January 2004 Decision. Although there can indeed be situations in which allowing a late-filed OFA may be consistent with the objectives of the OFA statute, the present situation is not one of them.

The NFP petition filed March 1, 2005, is largely a summary of the contents of pleadings previously filed in this proceeding by NFP and the Foxes. And, as already noted, with the possible exception of the information regarding NFP’s formation date, the NFP surreply filed March 30, 2005, contains nothing that has not already been entered into the record in this proceeding in the pleadings previously filed by NFP and the Foxes. The Foxes and NFP may realize now that, to protect their interests more fully, they should have filed an OFA for Segment 1 in 1999, but that does not justify the Board’s reopening and modification of the March 1999 Decision. The only thing that has changed since the July 2004 Decision was issued is the deadline by which the line must be abandoned (the deadline has moved from July 30, 2004, to September 27, 2005). That change does not materially affect the July 2004 Decision.

*Stay Request.* Our denial of NFP’s petition moots NFP’s stay request. The stay request will therefore be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CSXT’s motion to strike the surreply filed March 30, 2005, by NFP is granted.
2. The petition for reconsideration and reopening filed March 1, 2005, by NFP is denied. The stay request that was included within the petition filed March 1, 2005, by NFP is also denied.

3. This decision is effective on the service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary